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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-690

AIR POLLUTION VARIANCE BOARD
OF THE STATE OF COLORADO,
Petitioner

v.

WESTERN ALFALFA CORPORATION

On Writ of Certiorari to the Supreme Court of Colorado

BRIEF OF THE STATE OF COLORADO

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BRIEF OF THE STATE OF COLORADO

I. OPINION BELOW

The opinion of the Colorado Court of Appeals (Pet. App. A) is reported at 510 P.2d 907 (1973). The Supreme Court of the State of Colorado denied a Petition for Writ of Certiorari (Pet. App. B).

II. JURISDICTION

The judgment of the Colorado Court of Appeals (Pet. App. A) was entered on April 3, 1973. The Supreme Court of the State of Colorado denied a Writ of Certiorari on June 25, 1973 (Pet. App. B). The mandate of

the Colorado Court of Appeals was issued on June 26, 1973 (Pet. App. C). On September 25, 1973, Mr. Justice White extended the time for filing a Petition for a Writ of Certiorari to and including October 24, 1973. The Petition was filed on October 24, 1973 and was granted on January 21, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

III. QUESTIONS PRESENTED

1. Does a field inspector for a State Department of Health conduct an unreasonable search in violation of the Fourth Amendment when, pursuant to specific statutory authority, he enters upon commercial premises and, without notification to plant operators, takes visual readings of a smoke plume being discharged into the atmosphere, for the purpose of ascertaining compliance with State air pollution laws?

2. Is the owner or operator of an emission source denied his Fourteenth Amendment rights of confrontation and due process before an air pollution board if he is not given notice provided the opportunity to have an observer present when tests or measurements are made for the purpose of ascertaining compliance with air pollution laws?

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part that:

> [N] or shall any state deprive any person of life, liberty or property, without due process of law; . . .

3. Colorado Revised Statutes (C.R.S.), 1963, 66-29-8, (1967 Perm. Supp.) provided in pertinent part that:

> (1) (a) In addition to duties specified elsewhere in this article, the division shall have the duty to: . . . .
>
> * * * *
>
> (2) (d) *enter and inspect any property, premise, or place for the purpose of investigating either an actual or a suspected source of air pollution or air contamination or ascertaining compliance or noncompliance with any emission standard or any order under this article.* Any information relating to secret process, or methods of manufacture, or production obtained in the course of inspection or investigation shall be kept confidential. If samples of air or air contaminants are taken for analysis, a duplicate of the analytical report shall be furnished promptly to the person who is suspected of causing such air pollution or air contamination. (Emphasis supplied)

The Clean Air Act, 42 U.S.C. Section 1857c-9 (Section 114 of the Act) provides in pertinent part that:

> (a) Authority. . . . For the purpose (i) of developing or assisting in the development of any implementation plan under Section 110 or 111(d), any standard of performance under Section 111, or any emission standard under Section 112; (ii) *of determining whether any person is in violation of any such standard or any requirement of such a plan,* or (iii) carrying out Section 303.
>
> (1) The Administrator may require the owner or operator of any emission source to (A) establish and maintain such records, (B) make such reports, (C)

install, use, and maintain such monitoring equipment or methods, (D) sample such emissions (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (E) provide such other information as he may reasonably require: and
(2) *The Administrator or his authorized representative, upon presentation of his credentials . . . .*

(A) *shall have the right of entry to, upon, or through any premises in which an emission source is loctaed* or in which the records required to be maintained under paragraph (1) of this section are located, and (B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which the owner or operator of such source is required to sample under paragraph (1).

(b) Enforcement by state. (1) Each state may develop and submit to the Administrator a procedure for carrying out this section in such state. If the Administrator finds the State procedure is adequate, he may delegate such State any authority he has to carry out this Section (except with respect to new sources owned or operated by the United States). (Emphasis supplied.)

V. STATEMENT OF THE CASE

On June 4, 1969, a field inspector for the Colorado Department of Health (Division) entered the premises of three Western Alfalfa corporation plants located in Windsor, Eaton and Berthoud, Colorado, in the course of making visual observations of emissions being discharged from the plants' operations. Representatives of the division had been engaged in conference, conciliation and persuasion with officials of the Western Alfalfa Corporation since September of 1967 in regard to air pollution

violations (A. 21, 22, 29, 54): *Colorado law in effect on June 4, 1969 prohibited emissions which were in excess of a No. 2 Ringlemann or forty per cent equivalent opacity, discharging for a period in excess of three (3) continuous minutes.* C.R.S. 1963, 66-29-5, (1967 Perm. Supp.).

The statutory prescribed test, which is called a Ringlemann or opacity reading, is made by an inspector who has an unobstructed view of the emission. The inspector makes a visual observation of the emission and rates it according to the opacity scale of the Ringlemann chart. Inspectors are specially trained in a state-certified school to read and rate the various degrees of emission opacity. (A. 21)

The inspector who entered the three Western Alfalfa Corporation plant premises in the course of taking his readings observed the emissions from each source for at *least* a period of *ten* minutes. His readings of the emissions were as follows:

1. Windsor Plant

   Dryer—90% opacity
   Grinder—70% opacity
   Pelletizer—50% opacity

2. Eaton Plant

   Dryer—85% opacity
   Grinder—70% opacity
   Pelletizer—50% opacity

3. Berthoud Plant

   Dryer—90% opacity
   Grinder—50% opacity
   Pelletizer—40% opacity (A. 24-26)

Western Alfalfa was issued a Cease and Desist Order by the Division dated June 16, 1969 (A. 1-3), and then Western Alfalfa requested a hearing before the Air Pollution Variance Board for a determination of whether its operation were in violation of the emission standards. (A. 4-5) Hearings were held before the Air Pollution Variance Board on September 11, 1969 and October 16, 1969. On January 31, 1970, the Air Pollution Variance Board, after hearing the testimony of the field inspector and Western Alfalfa witnesses, found the company in violation of the state Air Pollution Control Act and affirmed the Cease and Desist Order which had been issued by the Division. (Pet. App. E) The District Court for Weld County held that the use of the Ringlemann test denied the company due process and reversed the decision of the Variance Board. The Colorado Court of Appeals held that the Ringlemann test was constitutional based on a Colorado Supreme Court decision directly on point (*Lloyd A. Fry Roofing Company* v. *State Department of Health*, et al., 499 P.2d 1176 (Colo. 1972) but affirmed the District Court on the basis that the inspector had conducted an unreasonable search and seizure because he did not have a warrant or obtain the consent of the plant officials to enter the plant premises, and that Western's rights of confrontation were denied unless it was given the opportunity to have an observer present to take opacity readings at the time the State took its readings. The Colorado Court of Appeals relied upon *Camara* v. *Municipal Court*, 387 U.S. 523 (1967) and *See* v. *City of Seattle*, 387 U.S. 541 (1967). The Colorado Supreme Court denied the petition for writ of certiorari to review the Court of Appeals decision. (Pet. App. B)

VI. SUMMARY OF ARGUMENT

This case presents the questions of whether Congress and a state may, consonant with the requirements of the Fourth Amendment, adopt a warrantless inspection procedure directed at the control of air pollution. The state maintains that Congress and the states have that authority where, as here, the authority to inspect is narrowly limited in time, location, and scope.

The state urges the validity of this statutory inspection scheme under the rationale of *Colonnade Catering Corporation* v. *United States*, 397 U.S. 72, and *United States* v. *Biswell*, 706 U.S. 311. There was no forcible entry involved, Western and personnel from the division had been dealing with each other for a period of approximately two years prior to June 4, 1969, and no criminal or civil penalty attached to the issuance of the cease and desist order.

The decisions in *Camara* v. *Municipal Court*, 387 U.S. 523 and *See* v. *City of Seattle*, 387 U.S. 541 do not require invalidation of the statute in question. The inspection authority is limited (1) in time to the business hours of a pollutor, (2) in place to the business site where the pollution occurs, and (3) in scope to the inspection for violations of the air pollution law.

The air pollution law in Colorado has been passed in the exercise of the police power of the state for the protection of the public health, welfare and safety. When legislation has been passed for such purpose and there is a statutory scheme for inspections, it is the position of the state that the Fourth Amendment does not apply.

The inspection in question was reasonable. The inspector, while standing in an area of Western's plant site, which was open to the public, simply took an opacity or Ringlemann reading of the emissions from Western's

operations. No search was conducted, no papers seized and no reasonable expectation of privacy was invaded. The "open fields" and "plain view" doctrines apply (*Hester* v. *U.S.*, 265 U.S. 57) and Western can have no reasonable expectation to privacy when it knowingly exposes its emissions to the public, *Katz* v. *United States*, 389 U.S. 347.

VII. ARGUMENT

A. The Regulation of Air Pollution Is Within the Police Power of the State.

The term "police power" was first mentioned in American Jurisprudence Case Law by Chief Justice Marshall in 1827 in the case of *Brown* v. *Maryland*, 12 Wheat. 419 (1827), in considering a requirement by the state of Maryland that every importer of foreign goods should, before selling them, obtain a license and pay fifty dollars for such license. Chief Justice Marshall stated that:

> "The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the states." (P. 443)

Chief Justice Marshall had conceived of such a power earlier although he had not specifically called it a "police power." In the Dartmouth College case, 4 Wheat. 518 (1819) he stated:

> "That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted." (P. 629).

It is apparent from the above that Chief Justice Marshall was of the opinion that the United States Constitution had left certain areas of legislation to the states, and he later referred to this area of authority as the "police

power" of the state. In 1824 in deciding the case of *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824) Chief Justice Marshall stated:

> "If Congress licenses vessels to sail from one port to another, in the same state, the act is supposed to be, necessarily, incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a state or to act directly on its system of police. So, if a state, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted Congress, but from some other which remains with the state, and, however, may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality." (P. 204) . . . .
>
> The acknowledged power of the state to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject to a considerable extent; . . . (P. 208)

The exercise of the police power for the public welfare may inconvenience individuals, increase their labor and decrease the value of their property, but it is a matter resting in the discretion of the legislature, and the courts will not interfere therewith except where the regulations adopted are arbitrary, oppressive, or unreasonable. Their wisdom or expediency cannot be subjected to judicial review, but the power is subject to the limitations imposed by the federal and state constitutions upon every

power of government, and it will not be suffered to invade or impair the fundamental liberties of the citizen.

A police measure must fairly tend to accomplish the purpose of its enactment and must not go beyond the reasonable demands of the occasion. But a large discretion is necessarily invested in the legislature, to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.

The regulation of a business to prohibit, control and prevent pollution of the air has been determined to be a valid exercise of the police power of the states in protecting the public health, welfare and safety of its citizens. *Lloyd A. Fry Roofing Company* v. *State Department of Health*, et al 499 P.2d. 1176 (1972).

B. Historical Development of the Fourth Amendment Indicates That the Warrant Requirement Is to Protect Against Unreasonable Search and Seizure.

The Fourth Amendment to the United States Constitution provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing a place to be searched, and the persons or things to be seized."

The Fourth Amendment has been made applicable to procedures in the state by the Fourteenth Amendment to the United States Constitution which provides in pertinent part that:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

As originally proposed in the First Congress, the Fourth Amendment stated:

> "The right of the people to be secure in their persons, houses, papers, and effects, shall not be violated by warrants issued without probable cause, . . ." (1 Annals of Cong. 1784-1789)

This draft was amended by adding the words ". . . against unreasonable searches and seizures, . . ." immediately following the word "effects". The obvious purpose of this change was to remove all but "unreasonable" searches from the purview of the amendment.

It is unlikely that the framers of the Fourth Amendment believed that administrative inspections were within the scope of its provisions. The amendment was written with reference to the common law right to be free from unreasonable searches and seizures. That this right evolved from efforts to protect Englishmen from searches for incriminating evidence to be used in *criminal proceedings* is evident from an examination of *Entick* v. *Carrington*, 2 Wils. K.B. 275, 95 Eng. Rep. 807, 19 How. St. Tri., col. 1030 (1765), the classic English case in point. Entick, a publisher of a political journal, *The Monitor*, was the victim of a search conducted pursuant to a general warrant. The warrant charged him with seditious libel but did not specify the papers to be seized. The Secretary, The Earl of Halifax, sent three messengers to apprehend Entick and seize his papers. Entick brought a trespass action against Carrington, one of the messengers, and recovered 300 pounds. Although *Entick* was a civil action for trespass, at issue was the legality of a search conducted as part of a criminal investigation.

In the *Entick* case, the court declared the general warrant (an instrument issued by the Secretary of State to aid officers in finding the publishers of criminal libel, by giving them blanket authority to search for evidence)

illegal. The court made it clear that the common law right to be free from unreasonable searches was a derivative from the common law right not to give evidence against oneself.

The "privilege against self incrimination" view of unreasonable searches and seizures was carried over into colonial law and is illustrated by the early Massachusetts decision in *Paxton's Case*, Quincy 51 (1761). This opinion concerned the validity of the writs of assistance, which were similar to English general warrants and used to enforce customs laws in the colonies. The colonists' concern for the proper application of the common law right to be free from unreasonable searches is apparent in this case.

An equation of the rights presently guaranteed by the Fourth and Fifth Amendments has thus been a part of American constitutional law since before the Bill of Rights was written. In fact, in the year in which the Bill of Rights was ratified, Congress passed a revenue act "which authorized inspections, searches and seizures, and required books to be kept by distillers, subject to government inspection." *United States* v. *3 Tons of Coal*, 28 Fed. Cas. 149 (16,515) (C.C.D. Mich. 1875) Congress did not condition the exercise of these powers on the authority of a search warrant.

The earliest Supreme Court case to examine the constitutionality of administrative searches was *Boyd* v. *United States*, 116 U.S. 616 (1886), overturning a statute (Act of June 22, 1874, § 5, 18 Stat. 186) granting authority to compel surrender of private papers which might constitute evidence of tax fraud. In its reasoning the Court considered the protective measures of the Fourth Amendment as designed to secure the freedom from self-incrimination guaranteed by the Fifth Amendment. Therefore, searches which gave rise to no Fifth Amendment problems were not to be subjected to the

warrant requirement of the Fourth Amendment. (Boyd, 116 U.S. at 624, 633) This suggests that no significant doubts about the validity of such procedures under *Entick* v. *Carrington*, supra, or under the spirit of the new Fourth Amendment to the Constitution, were entertained.

Recent American case law has consistently reaffirmed the fact that the Fourth Amendment does not apply to routine administrative inspections. As Judge Holtzoff stated in *District of Columbia* v. *Little*, 178 F.2d 13 at page 23 (D.C. Cir. 1949) (dissenting opinion) affirmed on other grounds 339 U.S. 1 (1950):

> "No reported case has been found that extends the scope of the Fourth Amendment to fields other than criminal law or the enforcement of penalties."

Little was the only case which applied the amendment to civil inspection prior to the Supreme Court decisions in *Camara* and *See*.

1. *This Case Does Not Fall Within the Purview of the Fourth Amendment.*

In *Camara* v. *Municipal Court*, *supra*, the Court held that a routine municipal housing inspection of a private dwelling was an unreasonable search in violation of the Fourth and Fourteenth Amendments unless consent or proper search warrant was obtained. In *See* v. *City of Seattle*, supra, the Court applied its holding in *Camara* to routine fire inspections of the non-public portions of a warehouse, but indicated that the warrant procedure for business inspections might be less formal than that required for private dwellings.

The cases of *See* and *Camara* represented a significant change in a principle of Anglo-American constitutional law which had enjoyed a tenure of more than two hundred years. Since no specific legal precedent for this change was given by the court in either opinion, these

decisions must be explained as an attempt to give judicial recognition to the fact that technological changes, and changed patterns in a municipal regulation of living conditions, have made such governmental practices subject to the Fourth Amendment.

A policy of altering established rules of law, with only brief reference to established precedent, could have the effect of depriving the constitution of much of the stability and continuity which it has long possessed.

In effect, the Court could have set up an exception to the warrant requirement, as *Frank* v. *Maryland*, 359 U.S. 360 (1959) had already been interpreted to do. Next, it could have outlined certain factors, the lack of which would make a search presumptively unreasonable. This would entail a decision on the order of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), which outlined prerequisites for an admissible confession. Many factors could have been included, most of which are already present in various statutes such as:

1. Inspection at reasonable times only.
2. No entry by force.
3. Proper credentials for the inspector.
4. Limitation of the evidence collected to the scope of conduct prohibited by the statute under which the inspection is being made.
5. Adversary hearing on the propriety of a requested but refused entry.
6. No criminal penalty for refusal of entry prior to such hearing.

Such procedures should be no more burden on the administrative agency than the warrant procedure and probably less.

The inability of this Court to support its decisions in *Camara* and *See* with specific precedent becomes even more apparent when consideration is given to numerous recent state decisions adhering to the traditional view that administrative inspections are not subject to the requirements of the Fourth Amendment. Since the *Little* case, supra, was decided in 1949, state courts in California, *Camara* v. *Municipal Court*, 237 Cal. App. 2d. 128, 46 Cal. Rptr. 585 (1963); Iowa, *State* v. *Rees*, 139 N.W.2d 406 (Iowa 1966); Maryland, *Givner* v. *State*, 124 A.2d 764 (Md. 1956); Massachusetts, *Commonwealth* v. *Hadley*, 222 N.E.2d. 681 (Mass. 1966); Missouri, *City of St. Louis* v. *Evans*, 337 S.W.2d 948 (Mo. 1960); Ohio, *State ex rel Eaton* v. *Price*, 151 N.E.2d 523 (Ohio 1958); South Carolina, *De Pass* v. *City of Spartanburg*, 107 S.E. 2d 350 (S.C. 1959); *Richards* v. *City of Columbia*, 88 S.E. 2d 683 (S.C. 1955); and Washington, *See* v. *City of Seattle*, 408 P.2d 262 (Wash. 1965), have upheld administrative inspections in the face of constitutional challenges. In addition, in *Frank* v. *Maryland*, supra, and *State ex rel Eaton* v. *Price*, supra, the Supreme Court upheld the validity of similar searches made without a warrant. The latter two cases were repudiated by the majority in *Camara* while other authority was ignored.

A close look at the line of cases on administrative search and seizures shows an intention on the part of the Court to create protections in the area of administrative search different from those which have come to be associated with the warrant through its use in criminal proceedings. The Court has paralleled this protection along the lines of the protection already provided against arbitrary use by administrative agencies of their subpoena power. (See generally, 1 K. Davis, Administrative Law §§ 3.03, 3.12 (1958), §§ 3.04, 3.06, 3.11, 3.12 (Supp. 1970)). If this is what was intended in 1967, then the entire line of cases is not as inconsistent or formalistic

as they would appear to be if focus were placed upon the warrant requirement alone.

The Court rejected the civil-criminal dichotomy of older cases and concluded that the applicability of the Fourth Amendment should not depend upon the nature of the search, but rather upon the need to "safeguard the privacy and security of individuals against arbitrary invasions by government officials." (*Camara*, 387 U.S. at p. 528) The opinion set forth the rule that where there is no emergency demanding immediate access, and no warrant is obtained for an inspection, there is a constitutional right to insist that a warrant be obtained and anyone refusing entry to an inspector without a warrant constitutionally cannot be convicted for refusing to consent to the inspection. *Camara*, 387 U.S. at p. 540)

In *See, supra*, a conviction for refusing to permit a representative of the City of Seattle Fire Department to enter and inspect a locked commercial warehouse was reversed. (*See*, 387 U.S. at p. 542) In effect the Court simply extended the *Camara* rule to business premises: "[*A*]*dministrative entry, without consent*, upon the portions of commercial premises which are *not open* to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure." (*See*, 387 U.S. at p. 545)

It is clear that the court intended for the *Camara* and *See* decisions to apply only to very limited situations. First, it was not intended that decisions in *Camara* and *See* should impede administrative inspections, and it was presumed that inspection programs to which the warrant requirement applied would normally continue upon consent; only rarely would a refusal make it necessary to seek a warrant. *Camara*, 387 U.S. at p. 539-40)

Second, both *Camara* and *See* indicated there would be circumstances when it would not be practical to seek a

warrant. *Camara* specifically excepted from the warrant requirement prompt inspections traditionally upheld in emergency situations. The examples given made it clear that "emergency" would be more liberally construed than in a criminal context. (*Camara*, 387 U.S. at p. 539) The Court mentioned seizure of unwholesome food, health quarantines, and the distruction of diseased cattle.

Third, there was also the suggestion that should some public need justify inspection in a situation where goals of inspection could not be achieved within the confines of a reasonable requirement for a warrant, a warrant would not be required. (*Camara*, 387 U.S. at p. 533)

In regard to business premises, the Court made it clear in *See* that they were not challenging regulatory techniques such as "licensing programs which require inspections prior to operating a business or marketing a product." These programs would need to be examined on a case-by-case basis. (*See*, 387 U.S. at p. 546) If read literally, the quoted language applies only to a small number of licensing schemes, but neither lower courts nor later decisions of the Supreme Court have given restrictive meaning to the language "prior to." For example, *United States* v. *Biswell*, 406 U.S. 311 (1972) involved the inspection of a business which had already begun to operate with a product already marketed.

Clearly *the Court did not intend the warrant requirement to override all other considerations or to value the right to privacy above the public need for inspections.* Therefore, only when the right to privacy outweighed the public need for inspections was the warrant required.

While the Court in *Frank* differentiated the requirements for administrative inspections from those for criminal searches on the basis of "reasonableness," the *Camara* Court based its distinction on the definition of probable cause.

In discussing probable cause sufficient to justify the issuance of a warrant, the Court adopted the rule: "If a valid public interest justifies the intrusion contemplated, then there is probable cause. . . ." (*Camara*, 387 U.S. at p. 539) In *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1945) the Court said that administrative subpoenas amount to "constructive" searches (*Okla. Press*, 327 U.S. at p. 202). From this the Court in *See* concluded that if the Fourth Amendment applied to administrative "constructive" searches, it certainly must apply to actual searches. (*See*, 387 U.S. at p. 545).

A result similar to that secured by the administrative subpoena process was obtained by the Court in *Camara*. Inspections would normally continue upon permission, without judicial review, just as most administrative subpoenas are honored without the need for judicial review. However, the decision requires a judicial review of the proposed administrative action before compliance can be demanded or refusal to cooperate can be treated as an offense, which is also true in the subpoena process.

The procedure for securing judicial review of a search had always been the warrant requirement. Since the warrant had been a creature of the criminal realm, its introduction to administrative inspections created considerable confusion about the intended standard of judicial review. The Court attempted to avoid this by creating standards different from those applicable to warrants for criminal searches, just as standards for administrative subpoenas had been distinguished from those for court subpoenas. The Fourth Amendment requirement of reasonableness was defined to cover both criminal and administrative investigation but to permit different standards of review for each (*Camara*, 387 U.S. at p. 534-35). The question of whether a particular type of search is reasonable is to be answered by determining if a legitimate government interest exists to justify an in-

trusion upon constitutionally protected rights of the citizen (*Camara*, 387 U.S. at pp. 514-535). This is not the kind of question which would need to be re-evaluated every time a warrant is sought. For example, there is no question that police searches for stolen goods are justified. Equally justified are inspections for unsanitary conditions in food processing and storage facilities or inspections for violations of housing and fire codes (*Camara*, 387 U.S. at p. 535). The Court found administrative searches to be reasonable upon the grounds they had long been accepted by the public and the judiciary, and were necessary to insure that conditions dangerous to the public interest were prevented or abated. Further the Court doubted that any means of enforcement except inspections would be effective and found inspections did not seriously invade personal privacy since such inspections are nonpersonal and not intended to discover evidence of crime (*Camara*, 387 U.S. at p. 537).

In addition to a determination that a *type* of search is reasonable, there is the question of whether a *particular* search is reasonable, which question is resolved by inquiring whether there is probable cause for the search (*Camara*, 387 U.S. at p. 538). "Probable cause" in general terms, is the standard by which a decision to search is tested against the constitutional requirement of reasonableness. In criminal law, establishment of probable cause requires a showing that something is connected with a crime and that it will probably be found in the place to be searched. Thus, probable cause tests a particular search against the general standard of reasonableness. There can be no public interest or legitimate purpose in random or indiscriminate searches for contraband (*Camara*, 387 U.S. at p. 534).

If administrative inspections, such as the area-wide search involved in *Camara*, are to be feasible, as they should be once it is determined that they are reasonable,

probable cause must not have the narrow meaning it has acquired in criminal law. It is not reasonable, nor is it in the public interest, to permit the police to search an entire city for stolen goods and therefore, in the criminal context, a narrow definition of probable cause is justified (*Camara*, 387 U.S. at p. 534). But since the primary purpose of inspection is to prevent on a city-wide basis the development of hazardous conditions, there is a strong public interest in area inspections without regard to whether there is reason to suspect violations in a particular building (*Camara*, 387 U.S. at p. 535). A showing of probable cause of the kind required in the criminal area would render administrative inspections only corrective at best and largely defeat their preventive purpose.

If a general rule is to be found, it is that "probable cause" exists "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling" (*Camara*, 387 U.S. at p. 538). This standard is closer to that for the review of administrative subpoenas than to that required to warrant criminal searches.

Exceptions to the warrant requirements of *Camara* and *See* were subsequently found in a number of federal regulatory schemes, such as the Food, Drug and Cosmetics Act, *United States* v. *Thriftimart, Inc.*, 429 F.2d 1006 (9th Cir. 1970), cert. den. 400 U.S. 926 (1971), the Federal Comprehensive Drug Abuse Prevention and Control Act, *United States* v. *Greenberg*, 334 F. Supp. 364 (W.D. Pa. 1971), The Gun Control Act, *United States* v. *Biswell*, *supra*, The Federal Coal Mine, Health and Safety Act of 1969, *Youghiogheny Ohio Coal* v. *Morton*, 364 F. Supp. 45 (S.D. Ohio 1973).

A good discussion on the consent issue is found in *United States* v. *Thriftimart, Inc.*, *supra*, in which the court began with the Supreme Court's recognition that

the constitutionality of administrative and criminal searches must be tested by different standards. From this premise the court reached the conclusion that there need be no warning of a right to insist upon a warrant, that failure to give such warning did not make the consent unknowing or involuntary, and that any manifestation of consent, no matter how casual, could be accepted as a waiver of the right to insist upon a warrant (*Thriftimart*, 429 F.2d at p. 1010). An implicit presumption of consent to administrative searches was held to exist whenever there was acquiescence based upon the inevitability of such inspections, the probable cause standard, and the nature of the searches. (*Thriftimart*, 429 F.2d at p. 1009) If inspections were to proceed upon consent, frequent litigation of the consent issue would impede the administrative process, which the Court in *Camara* made clear was not its intent (387 U.S. at p. 539).

In *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970), the Court required the suppression of evidence obtained by federal agents who entered appellant's liquor storage area by force. The Court found an exception to the *See* rule that inspection without consent may only be compelled by force or prosecution within the context of a warrant procedure. Though the only license involved was a state liquor license, inspections under the liquor laws were found to be within one of the "licensing programs" which *See* had reserved for resolution on a case-by-case basis (*Colonnade*, 397 U.S. at p. 76-77). The Court accepted the position that inspections under the liquor laws are not unreasonable because they have never been found to be so. In the year the Fourth Amendment was ratified, Congress provided for warrantless inspection of the premises of liquor distillers and importers. *Boyd* v. *United States*, *supra*, had also recognized this special treatment. Therefore, the Court concluded that in this area it was proper to permit Congress to establish standards for searches (*Colonnade*, 397

U.S. at p. 75-76). However, because Congress failed to make rules governing inspection procedure, the fourth amendment applied; and since the statutes did not specifically authorize force, the only recourse when entry was refused was the statutory fine (*Colonnade*, 397 U.S. at p. 77).

The *United States* v. *Biswell*, *supra*, decision carved out an exception to *See* for inspections of business premises pursuant to federal regulatory schemes. *Biswell* involved a licensing program under the Gun Control Act of 1968; however, the decision has not been limited in its application only to licensing programs. *United States* v. *Schafer*, 461 F.2d 856 (9th Cir. 1972) (Plant Quarantine Act); *United States* v. *Business Builders, Inc.*, 354 F. Supp. 141 (N.D. Okla. 1973); *United States* v. *Del Campo Baking Mfg. Co.*, 345 F. Supp. 1371 (D. Del. 1972) (Food, Drug, and Cosmetic Act); *United States* v. *Montrom*, 345 F. Supp. 1337 (E.D. Pa. 1972) (Comprehensive Drug Abuse Prevention and Control Act of 1970).

Whereas the *Colonnade* opinion limited statutory authorization for administrative searches to liquor regulation, where they could be justified as reasonable upon the basis of a unique historical treatment, *Biswell* gave broad approval to statutory authorization, abandoning the historical test and replacing it with the broader criterion of whether the scheme was to further an "urgent federal interest" (*Biswell*, 406 U.S. at p. 317). However, it is apparent from the considerations upon which the reasonableness of the warrantless inspection in *Biswell* was based that no carte blanche to replace warrant procedures by statutory authorization was intended. Those considerations were:

> (1) The inspection was a crucial part of a regulatory scheme in which "large interests" were at stake (*Biswell*, 406 U.S. at p. 315).

(2) The law could not properly be enforced and the inspection made effective unless inspection without a warrant was deemed reasonable conduct (*Biswell*, 406 U.S. at p. 316).

It is upon this factor that the Court distinguished the situation in *Biswell* from that in *See*. In *See* the defects subject to inspection, those in building structures, were relatively difficult to remedy or conceal in a short period of time. In *Biswell* the objects of inspection, guns, were easily and quickly concealed. Therefore, if the normal routine of inspection under the Federal Gun Control Act is to proceed without a warrant until one is demanded, as the *Camara* rule anticipated administrative inspections would proceed (387 U.S. at p. 539), then any violator could simply refuse to consent to the inspection and conceal the evidence of his violation while the inspector sought the necessary warrant.

(3) It would not be possible to establish a standard for obtaining a warrant which would offer any significant protection to the appellant and still provide sufficient flexibility in the search scheme to make it an effective means of enforcement (*Biswell*, 406 U.S. at p. 316).

To avoid this dilemma an inspector would have to obtain a large number of warrants before setting out on his rounds. Issuance of warrants in such numbers and in *ex parte* proceedings would become a mere formality, diluting the standard of probable cause even further, and leaving the court with no indication of when an inspector's conduct has been challenged.

(4) The search involved only limited threats to justifiable expectations of privacy.

The administrators of the Federal Gun Control Act provided licenses with an annual compilation of ordinances so that licensees were on notice of the law governing inspection of their business (*Biswell*, 406 U.S. at p. 316).

Therefore, one of the concerns expressed by the Court in *Camara* (387 U.S. at p. 532), the need for notice of the inspector's identity and powers, was not present when an inspection was subject to a regulatory scheme of this kind. Even without a warrant, there was notice of the inspector's authority, of the necessity of inspecting the particular premises as part of an administrative scheme, and of the scope of inspection.

Biswell held that when an inspection is determined to be pursuant to a proper regulatory scheme, there are standards which a statute must meet before its authorization of a warrantless search may be deemed reasonable:

> "In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute (*Biswell*, 406 U.S. at p. 315). The Gun Control Act of 1968 authorizes entry "during business hours, . . . to the premises (including places of storage) of any firearms or ammunition importer, manufacturer, dealer, or collector, . . . for the purpose of inspecting or examining . . . records or documents required to be kept . . . and . . . any firearms or ammunition . . . . 18 U.S.C. § 923(g)" (1970).

A lower court upheld less precise language which refered to inspection "at reasonable times," within "reasonable limits," of warehouses containing food products subject to federal regulations. *United States* v. *Del Campo Baking Mfg. Co., supra.* However, in neither of these two statutes is the language as imprecise as that in the ordinance at issue in *See* v. *City of Seattle, supra.* Seattle, Wash., Fire Code § *8.01.050:*

> *Inspection of Building and Premises:* "It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the

> purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards."

The first and most direct result of *Biswell* is to eliminate the necessity of consent once a regulatory scheme and a valid statute are found. In such circumstances the legality of the inspection depends upon neither a warrant nor consent. (406 U.S. at 315)

Second, within the context of such a qualifying regulatory scheme, it is permissible to establish statutory penalties for refusal to permit inspection even when no warrant was presented by the inspector as required by *Camara* and *See*.

Third, the *Biswell* and *Colonnade* decisions recognize the possibility that a legislative scheme specifically authorizing forcible entry might be unheld. The *Biswell* Court's holding that inspections such as that in *Biswell* are legal without consent or a warrant strongly suggests that a legislative authorization to inspect by force would be upheld. One lower court has already reached this conclusion (*Montrom*, 345 F. Supp. at p. 1339) (dictum).

In regard to inspections subject to statutory schemes of regulation the Court has come to a position close to that which it held in *Frank* v. *Maryland*, *supra*. This is true to the extent that in a large number of situations neither a warrant nor consent is required for a valid administrative search. Yet *Biswell* does not give blanket permission for all administrative searches to proceed without warrants; *Camara* and *See* have not been overruled. Thus, the warrant can be dispensed with only if two conditions are met: *First, the authorizing statute must contain standards limiting the time, place, and scope of the inspections; and second, the scheme of regulation must be so pervasive that those subject to inspection will have been put on notice by their own familiarity with the statutes and the frequent visits of inspectors.*

When the inspection of business premises is carried out under a valid statutory scheme, the same results are accomplished without a warrant as were accomplished without a warrant in inspections of the type involved in *Camara* and *See*. The purposes of a warrant as described in *Camara* (judicial review, and notice of the need, scope, and authority of the inspection) are equally satisfied under *Biswell* by a sufficiently precise statute applicable to businessmen who are aware that they are being regulated. Under both, warrant and statute limitations are placed upon the discretion of the inspector in the field, by the terms of the warrant in the first instance, and by the inspectee's knowledge of the inspector's statutory authority in the other. In either a *See* or a *Biswell* situation, the person subject to inspection has no opportunity to participate in a hearing prior to search. A two party hearing upon the propriety of the search can be obtained only after the inspection is completed. Refusal to honor inspection under either the warrant or the statute may result in penalties. Finally the review of probable cause upon which an administrative search warrant will issue under *Camara* and *See* amounts only to a determination that is part of a reasonable legislative and administrative scheme (*Camara*, 387 U.S. at p. 538). It is precisely such schemes which *Biswell* requires and for which it establishes standards.

Because of the exceptions made for licensing schemes in *See* and for federal regulatory schemes in *Biswell*, the warrant requirement and the related issues of consent and probable cause are inapplicable to a great number of administrative inspections.

C. This Case Does Not Fall Within the Purview of the Fourth Amendment.

The facts in this case indicate that enforcement personnel from the division had been conferring, counselling and conciliating with personnel of Western since Septem-

ber of 1967 (A. 21, 22, 29, 40, 41, 54) and that periodic visits had been made to the plant sites. (A. 24) During this period of time Western personnel had been furnished information, literature and engineering services in regard to the law in the state of Colorado and its pollution problem (A. 25, 59). The Western Alfalfa plant in Weld County, which is the subject of this case, is reached by a public, county road which borders a parking lot maintained by Western. There are no fences around the front part of the plants. And, no signs indicating that the public should not be in the area. In fact, there is a sign advertising Western's cattle feed product (See pictures attached to transcript of hearing September 11, 1969—not a part of the printed record). The public, as well as the inspectors for the Division, enjoyed unobstructed access to Western's premises and Western made a point of inviting the public on its premises to purchase its products. The alleged search was only one of a series of investigations made during a period of approximately two years of a continuing course of dealings between enforcement personnel for the division and Western.

The State does not question that Western could not consent to a single, isolated search without knowing of it in advance. However, the state maintains that Western conducted its activities so openly that an investigation of such activities for air pollution control purposes was no search at all. Western, through its course of dealings with enforcement personnel from the Division over a period of approximately two years, impliedly consented to this series of investigations. In such a pattern of searches, it is not necessary that the consent to each individual act be communicated in a volitional form. *United States* v. *Duffy*, 282 F.Supp. 777 (S.D. N.Y. 1968). Neither does it vitiate the consent that Western may have considered the impact that refusing consent

might have had upon the relations between the parties, and decided that it was in its own interest to cooperate. (*Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971)).

It is recognized that consent to a Fourth Amendment search need not take the highly structured form of the waiver associated with respect to Fifth and Sixth Amendment rights. *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). The determination is made in consideration of the totality of the circumstances.

The Fourth Amendment has never been read to require that agents of a state remain blind to evidence of violations, civil or criminal, that they may encounter in their everyday activities and investigations. Officers are fully able to testify as to whatever they have seen while not abridging constitutional rights. Such observations are not searches within the meaning of the Fourth Amendment.

The strength of the operative policies is evidenced by the "plain view" doctrine applicable even to constitutional seizures. Numerous cases have upheld the State's right to seize, without warrant, any evidence of a crime or civil violation that could be constitutionally seized pursuant to a valid warrant, *Cady* v. *Dombrowski*, 413 U.S. 433, (1973). A fortiori, where no seizure is involved, constitutional rights are not breached by the mere observation of a violation, and the investigator's later testimony is clearly admissible.

The State inspector clearly was not trespassing upon Western's open field on the day in question. In common law terms, he was an invitee, or if not an invitee, then a licensee of Western Alfalfa. *Indermaur* v. *Dames*, L.R. 1, C.P. 274, *aff'd*, L.R. 2, C.P. 311 (1866) laid down the rule that those who enter premises upon business concerning the owner are invitees and not trespassers. This is true regardless of whether the invitation is express or

implied. American courts have almost invaribly classified public inspectors who enter in the course of their duty as invitees, although the matter has been the subject of considerable discussion, (19 Vand. L.R. 407 (1966)). It has been so held in the case of sanitary inspectors, *Jennings* v. *Industrial Paper Stock Co.*, 248 S.W.2d 43 (Mo. 1952), and in the case of building inspectors, *Miller* v. *Pacific Constructors*, 157 P.2d 57 (Calif. 1945) and cases cited therein.

Here the parties had been involved for two years in frequent discussions concerning the series of visits similar in scope and time to the visit on June 4, 1969. Western knew of these visits and passed up numerous opportunities to voice complaint at a minimum of inconvenience to Western. Western was well aware that further similar visits were virtually inevitable and the only uncertainty was as to the time of the next visit. The fact that the inspector was operating as a licensee with Western's permission is evidenced by the fact that Western did not complain of the propriety of this entry on June 4, 1969 when notified of the violation, nor at the administrative hearing before the Air Pollution Variance Board, nor before the trial court or the Colorado Court of Appeals. Western in fact did not recall that the inspector was on the premises without its permission until after the Court of Appeals had entered its decision. There is nothing in the record before the Air Pollution Variance Board or trial court which indicates that Western had not consented to the inspections made by Division personnel or that it objected to such inspections.

The Fourth Amendment prohibits *unreasonable* searches and seizures without consent or a warrant. There is no indication in the record before this Court that the opacity reading taken by the inspector for the Division constituted an unreasonable search and seizure. No search was conducted, no rooms were entered, no papers

were inspected and seized and in fact no invasion of privacy occurred at all. In *Youghiogheny & Ohio Coal Company* v. *Morton, supra*, the court stated that:

> "The mine operator, though, does have a general expectation of privacy in his offices on the mining property. There is, however, no expectation of privacy of the maps, books and records which are maintained for and in compliance with the Mine Safety Act." (P. 51).

The same reasoning applies here. Western can have no expectation of privacy on the area of its property that is open to the public and to emissions which it is putting into the atmosphere which becomes a part of the air that is breathed and used by the public in general. The inspector merely observed and noted these emissions and Western was later issued a cease and desist order in regard to these emissions.

D. Assuming Arguendo That This Case Falls Within the Purview of the Fourth Amendment, the Facts Place It In One of the Exceptions Established by This Court.

Pursuant to C.R.S. 1963 66-29-10 (1967 Perm. Supp.) (Pet. App. D), the Division had been engaged in conference, concilation and persuasion with Western Alfalfa since September of 1967 in an attempt to bring Western's operations into voluntary compliance with the law. Western had been furnished copies of the law, the regulatory standards, and other pertinent material. (A. 35, 54, 59) Personnel from the Division had enjoyed a good relationship with Western and had gone on and off of Western's properties without a warrant or any special consent throughout this period of time.

After the opacity readings were taken on June 4, 1969, Western was issued a Cease and Desist Order dated June 16, 1969. No criminal or civil penalties attached to the Cease and Desist order at this time. Western had the

alternative of requesting a hearing before the Air Pollution Variance Board for a determination of whether they were in violation of the law, and if it was in violation to request a variance from the law, or to simply ignore the Cease and Desist Order on the basis that they were not in violation. Western chose the former route, and could have, but did not request a variance.

The Fourth Amendment, enforced against the states through the Fourteenth Amendment, prohibits unreasonable searches—a prohibition which the court in *Camara* forthrightly stated was difficult to translate into workable guidelines. The Court stated that: "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant," (387 U.S. at pp. 528-29). The court rejected *Frank* v. *Maryland, supra*, insofar as it allowed warrantless administrative health and safety inspections. It rejected criminal penalties for refusing admittance to inspectors without warrants. There was great emphasis placed upon the need for unbiased review of the decision to search:

> "We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty" (387 U.S. at p. 533).

Western Alfalfa would not have subjected itself to any criminal penalties for refusing access to the inspector had they known he was on the premises and not consented to his presence. Warrants will not change the inspection procedure used in Western, since the object of the procedure is to secure correction of violations, not convictions for crimes.

In *Camara* and *See*, both the majority and the dissent recognized a valid governmental interest in prevent-

ing conditions hazardous to health and public safety. The Court balanced the need for the inspection against the reasonable goals of code enforcement and found area inspections the only effective way to ensure compliance. The persuasive factors upon which the Court relied are:

> "First, such programs have a long history of judicial and public acceptance . . . Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. Many such conditions . . . are not observable from outside the building and indeed may not be apparent to the inexpert occupant himself. Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy." (*Camara*, 387 U.S. at p. 537).

The Court viewed the Fourth Amendment's evidentiary requirement as a flexible standard, permitting consideration of public and individual interests as reflected in a particular case's facts.

The Court in *Camara* and *See* left the door open for exceptions to search and seizures by warrant or consent such as emergencies and statutory licensing procedures.

An emergency situation is an exception to the warrant requirement. The court in *Camara* stated that:

> "Nothing we say today is intended to foreclose prompt inspections, even without a warrant . . . in emergency situations." (387 U.S. at p. 539).

The inspection of a licensed business is another exception to the warrant requirement. Because *open* business premises generally are not afforded Fourth Amendment protection the exception relates only to *closed* commercial premises.

In *United States* v. *Biswell, supra,* Biswell, a pawn shop operator, was federally licensed to deal in sporting

weapons. A federal treasury agent asked to inspect Biswell's locked gun store room. After being informed a search warrant was unnecessary and the inspection was authorized under a federal statute, Biswell acquiesced. The agent found two sawed-off rifles which Biswell was not licensed to possess. He was indicted and convicted of dealing in firearms without paying a special occupational tax.

The Supreme Court found the inspection reasonable under the Fourth Amendment and made an analogy between a licensee's submission to lawful authority and his decision to permit the inspection and a householder's acquiesance in a search pursuant to a warrant. The search's lawfulness did not depend upon consent in either situation, but upon independent statutory authority. The court stated that:

> "In the context of a regulatory inspection system of business premises which is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute" (406 U.S. at p. 315).

The court's opinions in *Camara* and *See, supra*, indicated that three basic considerations are critical in determining whether warrants are constitutionally required in the code-inspection context: (1) the demands of privacy, (2) the public need for warrantless searches, and (3) the standards to be employed in issuing warrants.

1. ***The Open Field and Plain View Doctrines Apply to This Case.***

The fact situation in this case justifies an exception to the *Camara and See* decisions even more than the *Biswell* case. The opacity readings were taken by the state inspector on premises owned by Western Alfalfa which were open to the public. The emissions observed were being emitted into the atmosphere in a manner such that

anyone who looked could have seen and observed said emissions (see photographs attached to original transcript of hearing before Air Pollution Variance Board). In *Hester* v. *United States*, 265 U.S. 57 (1924), Charlie Hester was convicted of concealing distilled spirits, and attempted to reverse the decision of the lower court on the basis that the testimony of two witnesses should have been excluded under the Fourth and Fifth Amendments of the Constitution of the United States. The evidence of the violation was collected without a warrant or the consent of Hester. The evidence in question was collected from different spots in the area of Hester's house but outside the physical boundaries of the house itself. This court, in answering the questions in regard to the Fourth and Fifth Amendments, stated that:

> "the officers had no warrant for search or arrest, and it is contended that this made their evidence inadmissible, it being assumed, on the strength of the pursuing officer's saying that he supposed they were of Hester's land, that such was the fact. *It is obvious that even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure.* The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle —and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned . . . . [*T*]*he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects', is not extended to the open fields.* The distinction between the latter and the house is as old as the common law. 4 Bl. Commentaries 223, 225, 226." (265 U.S. at p. 58-59) (emphasis supplied).

In *United States* v. *Capps*, 435 F. 2d 637 (9th Cir. 1970), the court stated that:

> "The Fourth Amendment's protections do not extend to the 'open field' area surrounding a dwelling and

> the immediately adjacent curtilage, and therefore, information gained as a result of a civil trespass on an 'open field' area is not constitutionally tainted, nor is the search and seizure which ultimately results from acquiring that information." (P. 640).

In Giacona v. *United States* 257 F. 2d 450, (5th Cir. 1958) cert. den. 358 U.S. 873, (1958) the court stated that:

> "In any event, evidence in not rendered inadmissible merely because it has been obtained by simple trespass upon land. The protection of the Fourth Amendment is not that extensive . . . .
>
> The Fourth Amendment protects against 'unreasonable searches and seizures'. Reasonableness is often a question of degree as to 'when the right of privacy must reasonably yield to the right of search.' What may be unreasonable in a search of a man's house may be entirely reasonable in a search of his place of business." (P. 456)

In *Koth* v. *United States*, 16 F.2d 59 (9th Cir. 1926) the court stated that:

> "The search was not unreasonable. It was upon open premises. *The special protection afforded by the Fourth Amendment to the people and their 'persons, houses, papers, and affects,' is not extended to the open fields.* The distinction between the latter and the house is as old as the common law. The officers were more than a quarter of a mile from the premises, smelled fermenting mash and fumes of distilling than in progress, and saw a drunken man approach from the direction of the still. The fact that the officers may have been trespassers does not exclude the evidence, after what they saw, heard, and smelled." (P. 61) (emphasis supplied)

The inspector in the Western case did not enter any building owned by Western nor attempt to search and seize any evidence within any enclosure owned by West-

ern. The inspector simply observed the emissions coming from Western's operations, approached the operations on the open fields and took an opacity reading which was later mailed to Western. It would appear quite clear that the factual situation of this case falls within the purview of the "open fields" and "plain view" doctrine exception to the Fourth Amendment requirements. The emissions of Western Alfalfa were not being secreted or contained behind any locked doors or enclosures maintained by Western but, on the contrary, were being put into the atmosphere where anyone who desired to look could see them.

2. ***The Statutory Scheme Provided by the Colorado Legislature and Congress Is a Valid Substitution For the Fourth Amendment Warrant Requirements.***

A warrant would serve no useful purpose in taking opacity or Ringlemann readings while on or off the premises of a violator. The primary purpose of a warrant is to interject the magistrate between the inspector and the potential violator in order that probable cause for a search may be determined by an objective third party and that the search will be reasonable limited in place, scope and time. There can be no serious question that air pollution control is a legitimate exercise of the police powers of the state and that in order to effectively control air pollution it is necessary that periodic and even frequent inspections be made of potential pollutors.

This court has held that pollution control legislation was a valid exercise of the police power of a state and not contrary to federal constitutional restrictions. In *Northwestern Laundry* v. *City of Des Moines*, 239 U.S. 486, (1915) the court enunciated the following rule:

> "So far as the Federal Constitution is concerned, we have no doubt that the state may by itself, or through authorized municipalities, declare the emis-

> sion of dense smoke in cities or populous neighborhoods a nuisance and subject to restraint as such; and that the harshness of such legislation, or its effect upon business interests, short of a merely arbitrary enactment, are not valid constitutional objections. Nor is there any valid Federal constitutional objection in the fact that the regulation may require the discontinuance of the use of property, or subject the occupant to a large expense in complying with the terms of the law or ordinance." (P. 491-92).

The Colorado legislature has set out sufficient standards to limit the search and seizure by an inspector in place, time and scope. In C.R.S. 1963 66-29-8 (2) (a) (d) (1967 Perm. Supp.) the division is given the power to:

> "enter and inspect any property, premise, or place for the purpose of investigating either an actual or a suspected source of air pollution or air contamination or ascertaining compliance or noncompliance with any emission standard or any order under this article" (Pet. App. D).

42 U.S.C. Section 1857 c-9 (Section 114 of the Clean Air Act) subsection (a) (2) provides in part that:

> "The Administrator or his authorized representative, upon presentation of his credentials (A) shall have a right of entry to, upon, or through any premises in which an emission source is located or in which any records required to be maintained under paragraph (1) of this section are located, and (B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which the owner or operator of such source is required to sample under paragraph (1)."

Therefore the Colorado legislature and Congress have limited such an inspection to searching for a violation of the air pollution laws of the state of Colorado and the

Federal Government. There is no question that if the inspector had uncovered a violation of the narcotics laws, the fire-arms laws, plumbing laws or other laws such violations would not have fallen within the scope of his inspection. Although the statute does not specifically limit an inspection to the business hours of the violator, as a practical matter there would be no useful purpose in inspecting a potential violator if he were not in fact operating his plant at the time of the inspection. There would also be no purpose in inspecting at any place except the plant itself as that is where the emissions are taking place. Therefore the obtaining of a warrant by an air pollution inspector would serve no useful purpose. The validity of the statute in question as a valid exercise of the police power of the state has been upheld by the Colorado Supreme Court in *Lloyd R. Fry Roofing Co.* v. *The State of Colorado Department of Health, supra.*

In the recent case of *Youghiogheny and Ohio Coal Company* v. *Morton, supra,* the court stated that:

> "There can be no question but that the right of government officials to enter privately owned mining property without notice or warrant constitutes a search within the meaning of the Fourth Amendment. . . . We further recognize that warrantless searches conducted without prior judicial approval are *per se* unreasonable under the Fourth Amendment, subject only to a few jealously limited and carefully guarded exceptions. . . . It has been recently underscored that the Fourth Amendment's prohibition against 'unreasonable searches' and seizures is shaped by the warrant clause, and thus that a warrantless search of private property is *per se* 'unreasonable' under the Fourth Amendment unless within one of the few specifically established and well delineated exceptions . . . .

We consider it equally well settled that the private commercial property of a businessman or corporation is, in general, protected by the Fourth Amendment. The Court would not be candid, however, if it failed to recognize that Fourth Amendment rights have been considerably restricted as they apply to commercial property affected by certain validly enacted regulatory schemes. *For example, an exception to the warrants requirement is now established for statutory regulation of businesses, pursuant to the government's police power, mandates warrantless entry.*

No violation of Fourth Amendment rights is deemed to occur in these analogous situations because, as the Court has recently observed, businessmen . . . 'engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade. . . . The businessman in a regulated industry in effect consents to the restrictions placed upon him' . . . ."

It would appear then that plaintiff at bar, a business in a pervasively regulated industry, has consented by implication at least, to reasonable intrusions by federal authorities.

The touchstone against which the instant legislative scheme must be tested is whether warrantless searches, in the context of mine safety investigations, are reasonable. . . .

To answer this inquiry regarding reasonableness, *the Court must consider, among other factors, whether the government has a valid and important interest in the area; whether resort to a judicial officer for a warrant would tend to frustrate the attainment of the regulatory ends of the statutory scheme; whether the owners of these premises have a reasonable expectation of privacy in them; and whether a grave danger of abuse is created by the allowance of warrantless entry.*" (P. 48-50) (emphasis supplied).

The court answered these questions adversely to the plaintiff and stated that:

> "The governmental interest in promoting mine safety, it might be concluded, far outweighs any interest the mine operators may have in privacy. (P. 51)
>
> The Act itself mandates frequent inspections. *When an inspection results in a notice of a violation, the mine operator has a right of administrative review.* Questions regarding the reasonableness of these entries must be raised in the first instance before the Secretary." (P. 52) (emphasis supplied)

In another recent case, *United States* v. *Business Builders, Inc., supra*, the court stated that:

> "It would be an affront to common sense to say that the public interest is not as deeply involved in the regulation of the food industry as it is in the liquor and firearms industries . . . .
>
> In effect, the statute takes the place of a valid search warrant. Thus, consent is immaterial and Defendants do not contend that the inspection was conducted unreasonably as to time, place or method. It follows, under the principles discussed above, that the articles seized by Plaintiff's agents were seized pursuant to lawful authority conferred by statute and Defendant's Motion to Suppress should be denied" (p. 143).

Every state in the Union, as well as the Federal Government has enacted air pollution control laws. There has been an intensive effort by the Federal and state governments in the past decade to preserve and conserve our environment. Such statutory and administrative controls have been uniformly upheld by the courts. *City of Miami* v. *City of Coral Gables*, 233 S.2d 7 (Fla. 1970); *Vermont Bd. of Health* v. *Town of Waterbury*, 274 A.2d 495 (Vt. 1970); *Sittner* v. *City of Seattle*, 384 P.2d 859

(Wash. 1963); *People* v. *Plywood Mfgs. of California*, 291 P.2d 587 (Calif. 1955); *People* v. *International Steel Corp.*, 226 P.2d 587 (Calif. 1951); *Board of Health of Weehawken, et al.* v. *New York Central Ry. Co.*, 72 A.2d 511 (N.J. 1950); *Penn-Dixie Cement Corp.* v. *City of Kingsport*, 225 S.W. 2d 270 (Tenn. 1949). Western did not have any justifiable expectations of privacy to be given Fourth Amendment protections. The Division had conferred and conciliated with Western since 1967 in regard to its air pollution problems and had furnished the company with copies of the applicable emission standards and law. Therefore, Western was well aware of the law and the fact that periodic and regular inspections would be made of its premises.

The control of air pollution is universally recognized as desirable legislation, necessary for the protection of the public health, welfare and safety. In balancing the privacy desired by industrial pollutors against the benefit to the public, the minimal invasion of a company's privacy does not outweigh the benefit to the public. A requirement that the inspectors obtain warrants or consent prior to the taking of opacity or Ringlemann readings would prevent effective air pollution inspections and serve no useful purpose. Fuels could be changed, production curtailed, expensive collection equipment switched on and off and other means used to frustrate the enforcement of air pollution laws if polluters were notified beforehand that an opacity or Ringlemann reading was going to be taken.

In *United States* v. *Schafer*, *supra*, the court allowed the warrantless search of appellant Schafer's luggage and distinguished the case from the *Camara* and *See* decisions, *supra*, by stating that:

> "Here, however, the time element is a major consideration. The objects of the search (quarantined fruits, vegetables, and plants) can easily be trans-

> ported out of Hawaii to the continental United States by departing tourists. . . . The purpose of the quarantine is to avoid these effects by preventing the movement of the potentially dangerous plant substances. We think a search warrant requirement would 'frustrate' the purpose of these inspections, because of the time delay inherent in the search warrant mechanism." (P. 858).

In the case at bar the inspector would not have had time to obtain a search warrant if he saw an industrial pollutor whose emissions violated the standards set by the law. Because of the rapidly dissipating nature of smoke evidence, readings must be taken immediately and a determination made that emissions exceed the standards for a period of three minutes. If it were necessary to obtain a warrant and notify the pollutor, effective endorcement of the law would be frustrated.

3. *The Fourth Amendment Provides No Protection for What a Person Knowingly Exposes to the Public, and Does Not Apply When There Is No Justifiable Expectation of Privacy.*

The cases of *Katz* v. *United States*, 389 U.S. 347 at p. 351 (1967), *Lewis* v. *United States*, 385 U.S. 206 (1966) at p. 210; and *United States* v. *Lee*, 274 U.S. 559 at p. 563 (1927) stand for the proposition that what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. Justifiable expectations of privacy, not "areas", are protected by the Fourth Amendment. Western's smoke emissions were open to the public view. Therefore, Western could have had no justifiable expectation of privacy as to the shade or opacity of its emissions.

Not only were the emissions from Western's plant knowingly exposed to the public, but the same emissions were dissipating into the atmosphere and becoming a part

of the air breathed by the public. In the recent case of *United States* v. *Dionisio*, 410 U.S. 1 (1973), this Court stated that:

> "In *Katz* v. *United States, supra*, we said that the Fourth Amendment *provides no protection for what 'a person knowingly exposes to the public, even in his home or office . . .*" 389 U.S. at 351. The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public . . .

In *United States* v. *Mara*, 410 U.S. 19 (1973), the Court extended its holding in *Dionisio, supra*, to handwriting exemplars.

Where a state has regulated a business enterprise under the police power of the state for the protection of the public health, welfare and safety of its citizens and has provided a statutory scheme of inspection that is limited in time, scope and place to insure compliance with such regulations, inspections thereunder do not fall within the purview of the Fourth Amendment protections. Such inspections constitute a minimal invasion of any expectation of privacy the business enterprise might have compared to the resultant benefit to the public. The Courts have approved administrative inspections of this type in a number of cases since the *Camara* and *See* decisions. *United States* v. *Biswell, supra, United States* v. *Thriftimart, Inc., supra; Youghiogheny & Ohio Coal Co.* v. *Morton, supra; United States* v. *Del Campo Baking Mfg. Co., supra;* and *United States* v. *Greenberg, supra.* Western Alfalfa, as a commercial pollutor, was subject to governmental regulation and had no reasonable expectation of privacy where the public health, welfare and safety is concerned.

E. Western's Rights of Due Process Guaranteed Under the Fourteenth Amendment Were Not Violated by the State.

Western complained that it was not notified at the time or shortly thereafter that opacity readings were being taken at its plant. The decision of the Colorado Court of Appeals stated that:

> "It was not until Western received the cease and desist order that it was aware of the fact that someone had been on its premises collecting evidence for a case against it. This fact convinces us that the hearing afforded Western lacked the fundamental elements of due process of law, since the secret nature of the investigation foreclosed Western from putting on any rebuttal evidence. . . .
>
> Western could not effectively rebut the evidence against it since it had no representative present at the time the test was administered, nor did it have any knowledge of the nature of its emissions on the date in question. This is particularly important since the Board made it very clear that the only evidence which was probative of whether Western was in violation of the Act was evidence which would rebut the evidence of the alleged violation on June 4, 1969. Since violations of the Act can be based upon emissions aggregating three minutes or more during any hour, 1967 Perm. Supp. C.R.S. 1963, 66-29-5(2)(a), and since the evidence by its very nature is continually dissipating, we conclude that it is constitutionally mandatory in this type of case that the party accused be aware of the taking of tests and measurements on its premises at the time they are made.
>
> Had Western known of the field observer being on its premises on the day of the investigation, it would have had a reasonable opportunity to effectively exercise its rights of confrontation at the hearing before the Board. 1969 Perm. Supp., C.R.S. 1963, 3-16-4." (Pp. 909-910)

The Court of Appeals confused the notice required to be given during the gathering of evidence with the required notice of a hearing. No cases suggest that an air pollution violator or an accused in a criminal case must be furnished notice prior to, or at the time of gathering evidence against him. The notice referred to in the Colorado Court of Appeals' decision in C.R.S. 1963, 3-16-4 (2) (1969 Perm. Supp.) provides in part that

> ". . . Any person entitled to notice of a hearing shall be given timely notice of the time, place, nature thereof, the legal authority and jurisdiction under which it is to be held, and the matters of fact and law asserted. Unless otherwise provided by law, such notice shall be served personally, or by mailing by first class mail to the last address furnished the agency by the person to be notified, at least twenty days prior to the hearing."

In this section of the statute (the Colorado Administrative Practice Act) the legislature was referring to notice that is to be given a party prior to the administrative *hearing* and not to notice that evidence is being collected. The Air Pollution Control Act (Pet. App. D) also provides that:

> "In case of failure by conference, conciliation, or persuasion to correct or remedy such violations, the division shall cause to be issued and served upon the person allegedly violating any such standard a written order which shall specify the provision of the emission standards of which such person is said to be in violation and a statement of the manner in which such person is said to violate it, and such order shall require the person so complained against to cease and desist from such violation within such reasonable time as the division may determine." C.R.S. 1963, 66-29-10(3), (1967 Perm. Supp.)

The opacity and Ringlemann readings in question were taken on June 4, 1969, and Western Alfalfa was fur-

nished a cease and desist Order dated June 16, 1969, pursuant to the above section of the statute. The Act also provides that:

> "Within ten days after receipt of such order, the recipient thereof may file with the Air Pollution Variance Board a written request for a hearing as to whether or not such violation exists or for a variance, or both . . . ." C.R.S. 1963, 66-29-10, (1967 Perm. Supp.)

Western requested such a hearing for a determination of whether it was in violation of the Air Pollution Control Act. The Air Pollution Variance Board proceeded to schedule such a hearing as required by the statute, Western's request, and the Administrative Practice Act of Colorado.

> "Not less than fifteen days after a hearing has been requested pursuant to Section 66-29-11(3) or Section 66-29-7(5)(d) the Air Pollution Variance Board shall grant such request and set a time and place therefor. Every such hearing shall be conducted pursuant to the provisions of this article and the provisions of Article 16 of chapter 3, C.R.S. 1963." C.R.S. 1963, 66-29-12, (1967 Perm. Supp.)

Notice was given to Western of the hearing by a written notice dated August 15, 1969.

In *Goldberg* v. *Kelly*, 397 U.S. 254, (1970) this Court discussed procedural due process and notice and concluded that due process would require that a welfare recipient, on proposed termination of public assistance benefits, be given

> "timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own argument and evidence orally." (p. 267-268).

At the hearings conducted before the Air Pollution Variance Board on September 11, 1969 and October 16, 1969 Western Alfalfa was represented by Counsel Donald D. Cawelti, and George D. Blackwood, Jr. (Mr. Blackwood was not at the October 16, 1969 hearing.) The *Goldberg* due process test was met because: (1) Western had adequate notice of the hearings on September 11, 1969 and October 16, 1969. (2) At the hearing itself Western presented whatever evidence it desired. (3) Western was reprsented by counsel of its choosing. (4) Western cross-examined all witnesses who testified in regard to the violation and furnished documentary evidence to the Air Pollution Variance Board. Therefore, it is submitted that the due process requirements of the Fourteenth Amendment were satisfied in the gathering of evidence and the hearings held before the Air Pollution Variance Board of the State of Colorado. Western was not precluded from presenting any rebuttal evidence which it desired. What it chose to place before the Board was testimony by Carrol Syverson, executive vice-president of Western Alfalfa Corporation. Mr. Syverson testified that he hired Mr. Richard Ronning, an engineer residing in Overland Park, Kansas, in 1968 shortly after he was contacted by the Colorado enforcement officials about Western Alfalfa's air pollution problems. Mr. Syverson further testified that Mr. Ronning made observations and readings of Western's operations in Colorado and reported that in his opinion, the company was not in violation of Colorado Law (A. 54-57). Mr. Ronning was not personally before the Board and subject to cross examination regarding his opacity and Ringlemann readings, and there was no evidence presented that he was qualified to take such readings. Notwithstanding the above, the Board considered and allowed this rebuttal evidence. In addition to the alleged opacity and Ringlemann readings taken by Mr. Ronning, Mr. Syverson also testified that he was familiar with the state of Colorado

Air Pollution Control Act (A. 59). Mr. Syverson further testified that Western Alfalfa Corporation hired Stearns-Roger, a local engineering firm, to conduct an analysis of its emissions in June or early July after it had received the Cease and Desist Order dated June 16, 1969 (A. 59). It was stipulated by counsel that the engineering report could be received for whatever it was worth by the Board (A. 71, 82). The Board did receive the engineering report, notwithstanding the fact that the testing and analysis by Stearns-Roger were not conducted pursuant to the statute. Testimony from the Division established that there was no correlation between a Ringlemann Number 2 or 40% opacity finding and the 0.40 pounds of particulate per 1000 pounds of undiluted gas (A. 79, 80). The engineering firm's report was submitted to the Division either the day before or the day of the hearing (A.79).

Due process was also provided in that the issuance of a Cease and Desist Order dated June 16, 1969 came after a period of at least a year and a half of conference and conciliation with Western Alfalfa in an effort to bring its operations into voluntary compliance with the law. Western requested a hearing before the Variance Board on the question of whether it was in violation of the law and the only effect of the January 31, 1970 decision by the Board was that Western was in violation. There were no civil or criminal penalties attached to this finding. Western's alternatives at this point in time were: (1) to seek judicial review of the Variance Board's determination; (2) to request a hearing before the Variance Board for a variance during which time it would bring its operations into compliance; or (3) to simply continue operations on the basis that they were not in violation of the law. Western chose to seek judicial review of the Variance Board's decision.

The Air Pollution Control Act of the state of Colorado requires that emission sources be in compliance with the

law at all times, with the exception of periods of less than three minutes during any one hour. Western could have had a trained observer taking readings each day, and thus would have had a reading for June 4, 1969 to give the Board. In fact, Western did not even obtain opacity or Ringlemann readings on the date or shortly after the date it received the Cease and Desist Order dated June 16, 1969. The Colorado statute did not require notice to a violator at the time the state gathered evidence against such violator. If this were the meaning of "notice", it would be necessary for an accused to have his own expert present at a ballistic test, at a blood stain analysis, at a banking examiner's check of bank records, a policeman's ticketing of a parked car, etc. This requirement would completely frustrate the permissable gathering of evidence by governmental officials.

In *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, (1956) the Court stated that:

> "We agree that a 'full hearing' under Section 309 means that every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Such a hearing is essential for wise and just application of the authority of administrative boards and agencies." (P. 202)

The hearings accorded Western led to a finalization of the Board's Cease and Desist Order. This order was appealed to the Colorado District Court which reversed the Board, the Colorado Court of Appeals and, the Colorado State Supreme Court. Seven years after violations were first observed, Western's due process rights are still being safeguarded, now by the United States Supreme Court. If the original Cease and Desist Order is reinstated as a result of this appeal, Western may then request a variance and, if denied, can once again initiate judicial re-

view of that finding. Only when all such appeals are exhausted, a final order is affirmed, and *subsequent* violations occur, can Western incur its first fine.

Notice to parties *under investigation* is certainly not mandated. In many instances, this would hamstring the agency in the performance of its investigatory duties. Most agencies could not conduct an efficient investigation if the persons being investigated were permitted to convert the investigation into a trial with all the due process safeguards appropriate in that trial forum. *Hannah* v. *Larche*, 363 U.S. 420 at p. 442-446 (1960).

The trial court and the Colorado Court of Appeals appeared to have its sense of fairness offended by a procedure in which evidence was collected by personnel of the Division without Western having the opportunity to collect evidence at the same time.

Procedural due process has been characterized as directed toward two objectives.

> "One is insuring the integrity and reliability of the guilt-determining process. The other is respecting the notion of man's dignity, which may be denigrated either by procedures that fail to respect his intrinsic privacy or that entail the imposition of shocking brutality. The word "fairness" has been interpreted as demanding: that the accused be put on fair notice of the nature of the prohibitive acts; that he be given an adequate opportunity to present his side through counsel before a fair and impartial tribunal free from prejudicial influences; that he be entitled to be continuously present at the trial; that he be entitled to confront and cross-examine his accusers; and that he have the right to be free of the damaging and untrustworthy influence of coerced confessions and testimony knowingly perjured."

Capler v. *City of Greenville Mississippi*, 298 F.Supp. 295 at p. 298 (N.D. Miss. 1969). Western's due process rights were satisfied pursuant to the above interpretation.

The fact that the inspector who took the opacity readings on June 4, 1969 would be afforded much credibility by the Air Pollution Variance Board and the court did not affect Western's due process rights. Because he was an expert observer, and because the statutory violation is committed whenever the standard is exceeded for three minutes, the inspector's testimony became virtually unassailable. However this was because such testimony was substantively sound, not because it was procedurally unfair. Evidence difficult to rebut is no more unfair than the fact that speeders rarely prevail in court against the testimony of an officer who observed them speeding. This is not to indicate that such testimony is never rebuttable. Just as the traffic officer can be wrong if his radar machine is not calibrated properly, wrong if his own powers of observation are faulty, or if he is waging a personal vendetta against the accused, so to the testimony of an agency official can be impeached under cross examination for any number of reasons.

It is not clear whether the Colorado Court of Appeals was saying that Western's due process rights were violated because its Fourth Amendment rights were violated, or that its due process rights were violated, because it did not receive notice of the opacity reading prior to or at the time of the taking of such reading on June 4, 1969. As discussed, neither reason has merit, and Western was accorded full due process protection.

VIII. CONCLUSIONS

It is respectfully submitted that the prohibitions in the Fourth Amendment to the United States Constitution are not applicable to the fact situation before this court. No search and seizure was involved and if it was it was not an unreasonable search. Western's emissions into the public atmosphere were knowingly exposed to the public. The state inspector in question was operating

pursuant to a statutory scheme under a statute enacted pursuant to the police power to protect the public health, welfare and safety of the citizens of the State of Colorado.

It is respectfully requested that this Court reverse the decision of the Colorado Court of Appeals.

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